U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 22-0360 BLA

JULIUS D. JOHNSON Claimant-Petitioner v. LONE MOUNTAIN PROCESSING INCORPORATED and Self-Insured Through ARCH RESOURCES INCORPORATED c/o UNDERWRITERS SAFETY & CLAIMS Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 6/06/2023 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Scott R. Morris, Administrative Law Judge, United States Department of Labor.

Julius D. Johnson, Harlan, Kentucky.

Before: GRESH, Chief Administrative Appeals Judge, BOGGS and BUZZARD, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without representation,[1] Administrative Law Judge (ALJ) Scott R. Morris's Decision and Order Denying Benefits (2020-BLA-05934) rendered on a claim filed on October 8, 2019, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Claimant did not establish complicated pneumoconiosis and therefore could not invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3) (2018); 20 C.F.R. §718.304. Next, the ALJ found Claimant established thirty-six years of qualifying coal mine employment, based on the parties' stipulation, but failed to establish a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b). Thus, the ALJ found Claimant could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act[2] or establish entitlement pursuant to 20 C.F.R. Part 718. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305. He therefore denied benefits.

On appeal, Claimant generally challenges the ALJ's denial of benefits. Neither Employer nor the Director, Office of Workers' Compensation Programs, has filed a substantive response.

In an appeal filed without representation, the Board addresses whether substantial evidence supports the Decision and Order below. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-86 (1994). We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[3] 33 U.S.C.

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[1] Robin Napier, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested that the Benefits Review Board review the ALJ's decision on Claimant's behalf, but she does not represent Claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[2] Section 411(c)(4) provides a rebuttable presumption that a miner is total disabled due to pneumoconiosis if he has at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[3] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because Claimant performed his last coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 15, 20; Director's Exhibit 3.

§921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits under the Act, Claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Statutory presumptions may assist a claimant in establishing these elements when certain conditions are met, but failure to establish any one of these elements precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Complicated Pneumoconiosis

Section 411(c)(3) of the Act provides an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if he suffers from a chronic dust disease of the lung which: (a) when diagnosed by x-ray, yields one or more large opacities greater than one centimeter in diameter that would be classified as Category A, B, or C; (b) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (c) when diagnosed by other means, is a condition that would yield results equivalent to (a) or (b). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. The ALJ must weigh all evidence relevant to the presence or absence of complicated pneumoconiosis before determining whether Claimant has invoked the presumption. *Gray v. SLC Corp.*, 176 F.3d 382, 389-90 (6th Cir. 1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991) (en banc).

The ALJ found there was no biopsy evidence and that the x-rays, medical opinions, and Claimant's treatment records are insufficient to support a finding of complicated pneumoconiosis. 20 C.F.R. §718.304(a)-(c); Decision and Order at 5-12. Thus, weighing the evidence as a whole, he determined Claimant did not invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3). 20 C.F.R. §718.304; Decision and Order at 12.

X-ray Evidence at 20 C.F.R. §718.304(a)

The ALJ considered seven interpretations of four chest x-rays.[4] Decision and Order at 6-8. He correctly noted that all of the interpreting physicians are dually-qualified B

[4] On his Evidence Summary Form, Claimant identified Claimant's Exhibit 2 as a reading by Dr. Miller of a March 6, 2020 x-ray; however, as the ALJ noted at the hearing, the actual reading was never submitted. Hearing Transcript at 7-13; Claimant's Evidence Summary Form at 2. The ALJ did not admit Claimant's Exhibit 3, Dr. Ramakrishnan's

readers and Board-certified radiologists, except Dr. Ramakrishnan who is a Board-certified radiologist but not a B reader.[5] *Id.* at 6-7; Director's Exhibits 19, 20, 22, 23, 25; Claimant's Exhibit 1.

Dr. DePonte read the July 30, 2019 x-ray as positive for simple and complicated pneumoconiosis, while Dr. Adcock read it as positive for simple pneumoconiosis but negative for complicated pneumoconiosis. Director's Exhibits 19, 23. Dr. DePonte read the December 2, 2019 x-ray as positive for simple and complicated pneumoconiosis, while Dr. Seaman read it as positive for simple pneumoconiosis but negative for complicated pneumoconiosis.[6] Director's Exhibits 13, 20. Drs. Meyer and Adcock read the March 6, 2020 x-ray as positive for simple pneumoconiosis but negative for complicated pneumoconiosis. Director's Exhibits 22, 24. Dr. Ramakrishnan provided the sole reading of the January 11, 2021 x-ray, and read it as positive for simple and complicated pneumoconiosis. Claimant's Exhibit 1. Weighing all the x-rays together, the ALJ found "that the preponderance of the x-ray evidence supports a finding of simple clinical

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reading of a December 2, 2019 x-ray, because it was untimely submitted and Claimant did not establish good cause for doing so. Decision and Order at 4 n.4; Hearing Transcript at 7-13. We consider any potential error in the ALJ not admitting Claimant's Exhibit 3 to be harmless because the x-ray reading was negative for complicated pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Decision and Order at 4 n.4, 6-8; Hearing Transcript at 7-13.

[5] The ALJ determined the record did not support Claimant's assertion that Dr. Ramakrishnan is a B reader but was sufficient to establish he is a Board-certified radiologist, as "his current position as the Medical Director of Community Radiology of Virginia Imaging Center surely would require such." Decision and Order at 7 n.9; Claimant's Exhibit 1; Claimant's Evidence Summary Form at 2. In addition, the ALJ noted that Dr. Meyer's curriculum vitae only reflects that he was a B-reader from 1999 to 2010, and his certificate is for the period of 2007 through 2010. Decision and Order at 6 n.8; Director's Exhibit 25 at 2, 16. However, the ALJ credited Dr. Meyer as a B-reader because the doctor represented that he was one on his reading of the March 6, 2020 x-ray. Decision and Order at 6 n.8; Director's Exhibit 24. We see no error in either determination. *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 254-55 (6th Cir. 1983).

[6] Dr. Gaziano reviewed the December 2, 2019 x-ray for quality purposes only. Director's Exhibit 15.

pneumoconiosis, but it does not support a finding of complicated pneumoconiosis." Decision and Order at 8.

The ALJ correctly found the March 6, 2020 x-ray does not support a finding of complicated pneumoconiosis as both dually-qualified radiologists who read it interpreted it as negative for the disease and their readings are uncontradicted. Decision and Order at 8; Director's Exhibits 13, 20. He also permissibly found the readings of the July 30, 2019 and December 2, 2019 x-rays to be in equipoise with respect to complicated pneumoconiosis because an equal number of dually-qualified physicians read both x-rays as positive and negative for the disease. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 281 (1994); *Woodward v. Director, OWCP*, 991 F.2d 314, 321 (6th Cir. 1993); Decision and Order at 6-8; Director's Exhibits 13, 19, 20, 23. Lastly, the ALJ correctly found the January 11, 2021 x-ray supports a finding of complicated pneumoconiosis as the only radiologist who read it interpreted it as positive for the disease and his reading is uncontradicted. Decision and Order at 8; Claimant's Exhibit 1.

Because there is one positive x-ray, one negative x-ray, and two x-rays with readings in equipoise, we see no error in the ALJ's overall finding that Claimant did not satisfy his burden of proof. *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 281 (1994). As the ALJ performed both a quantitative and qualitative evaluation of the conflicting readings taking into consideration the physicians' qualifications, we affirm as supported by substantial evidence the ALJ's finding that Claimant failed to establish complicated pneumoconiosis by x-ray at 20 C.F.R. §718.304(a). *See Staton v. Norfolk & W. Ry. Co.*, 65 F.3d 55, 58-60 (6th Cir. 1995); *Woodward*, 991 F.2d at 321; Decision and Order at 5-8.

Other Evidence at 20 C.F.R. §718.304(c)[7]

The ALJ considered the medical opinions of Drs. Forehand and Dahhan. Decision and Order at 9-11. Dr. Forehand opined Claimant has complicated pneumoconiosis based on his coal dust exposure and Dr. DePonte's positive reading of the December 2, 2019 x-ray. Director's Exhibit 13 at 3-4. The ALJ permissibly gave Dr. Forehand's opinion little weight because it was premised on the December 2, 2019 x-ray – which Dr. DePonte read as positive but which the ALJ found in equipoise – without awareness of Dr. Seaman's negative reading, and was contrary to the ALJ's overall weighing of the x-ray evidence, which the ALJ found did not support the establishment of complicated pneumoconiosis. *See Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255; Decision and Order at 11.

[7] There are no computed tomography scans for consideration at 20 C.F.R. §718.304(c).

The ALJ accurately noted that Dr. Dahhan did not review any x-ray evidence and that his opinion was limited to a discussion of total disability and legal pneumoconiosis. Decision and Order at 11; Director's Exhibit 21. Thus the ALJ permissibly accorded his opinion no weight as to the presence or absence of complicated pneumoconiosis. Decision and Order at 11.

The ALJ also considered Claimant's treatment records from Mountain Heart Center and St. Charles Community Health Center.[8] Decision and Order at 11-12; Claimant's Exhibits 4, 5. He accurately noted that there is no mention of pneumoconiosis in the treatment records from Mountain Heart Center. Decision and Order at 12; Claimant's Exhibit 4. The treatment records from St. Charles Community Health Center included diagnoses for "[p]ulmonary fibrosis, unspecified" and coal workers' pneumoconiosis. Decision and Order at 11-12; Claimant's Exhibit 5. They also include a copy of Dr. DePonte's reading of the July 30, 2019 x-ray as revealing a Category A opacity.[9] Decision and Order at 12; Claimant's Exhibit 5 at 5. Because the ALJ already weighed the July 30, 2019 x-ray in finding the x-ray evidence insufficient to establish complicated pneumoconiosis, and none of the references to coal workers' pneumoconiosis in the records identify it as complicated pneumoconiosis or otherwise explain the basis for that diagnosis, the ALJ permissibly found the treatment records neither prove nor disprove that Claimant has complicated pneumoconiosis. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305 (6th Cir. 2005); *Rowe*, 710 F.2d at 255; Decision and Order at 12.

Weighing all of the evidence together, the ALJ permissibly found Claimant failed to establish complicated pneumoconiosis at 20 C.F.R. §718.304. *See Gray*, 176 F.3d at 389-90; *Melnick*, 16 BLR at 1-33; Decision and Order at 12. Consequently, we affirm the ALJ's finding Claimant failed to invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3).

Invocation of the Section 411(c)(4) Presumption – Total Disability

To invoke the Section 411(c)(4) presumption or establish entitlement under 20 C.F.R. Part 718, Claimant must establish he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §§718.204(b)(2), 718.305(b)(1)(iii). A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing

[8] The ALJ referred to these records as being from "Stone Mountain Health." Decision and Order at 11; Claimant's Exhibit 5.

[9] As discussed above, the ALJ permissibly found the readings of the July 30, 2019 x-ray to be in equipoise and the weight of the x-ray evidence as a whole insufficient to establish complicated pneumoconiosis. Decision and Order at 6-8.

his usual coal mine work and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on qualifying pulmonary function studies, qualifying arterial blood gas studies,[10] evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The ALJ must weigh all relevant supporting evidence against all relevant contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc). The ALJ found Claimant failed to establish total disability and thus denied benefits. Decision and Order at 16.

The ALJ accurately found the two pulmonary function studies were non-qualifying; the two blood gas studies were non-qualifying; and there was no evidence of cor pulmonale with right-sided congestive heart failure. *See* 20 C.F.R. §718.204(b)(2)(i)-(iii); Decision and Order at 13-16; Director's Exhibits 13, 21. We therefore affirm the ALJ's findings that Claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). *See* Decision and Order at 13-16.

In considering the medical opinion evidence, the ALJ rationally found Claimant's usual coal mine work required "heavy exertion."[11] *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988) (en banc) (ALJ has discretion to assess witness credibility and the Board will not disturb his findings unless they are inherently unreasonable); Decision and Order at 4-5. Thus, we affirm that finding.

The ALJ considered Dr. Forehand's opinion that Claimant is totally disabled, and Dr. Dahhan's opinion that he is not.[12] Decision and Order at 9-11, 15-16; Director's Exhibits 13, 21. Dr. Forehand conducted the Department of Labor's complete pulmonary evaluation of Claimant on December 2, 2019, and obtained non-qualifying pulmonary

[10] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study yields values that exceed those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

[11] The ALJ relied on Claimant's statements that his coal mine work required him to lift between seventy-five and one hundred pounds multiple times per day. Decision and Order at 4-5; Hearing Transcript at 15; Director's Exhibit 4.

[12] Dr. Dahhan opined Claimant is not totally disabled by a pulmonary or respiratory impairment based on his non-qualifying pulmonary function and blood gas study evidence. Director's Exhibit 12 at 4.

function and blood gas studies. Director's Exhibit 13. He opined that "a statutory totally and permanently disabling impairment [complicated pneumoconiosis] is present." *Id.* at 4-5. In addition, he opined Claimant could not return to his last work because additional coal dust exposure would have an "extremely high likelihood" of causing further damage to his lungs. *Id.* at 4.

The ALJ permissibly gave Dr. Forehand's opinion little weight because his understanding that Claimant was totally disabled was based solely on his belief that Claimant had complicated pneumoconiosis, which was contrary to the ALJ's determination that the evidence as a whole did not support a finding of complicated pneumoconiosis. *See Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255; Decision and Order at 16. Moreover, Dr. Forehand's recommendation that Claimant not return to work in the mines to avoid further dust exposure is also insufficient to support a finding of total disability. *See Zimmerman v. Director, OWCP*, 871 F.2d 564, 567 (6th Cir. 1989) (recommendation against further dust exposure is not a diagnosis of total respiratory or pulmonary disability). As the ALJ permissibly rejected Dr. Forehand's opinion, the only medical opinion of record that could support a finding of total disability, we affirm his finding that Claimant failed to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). *See Martin*, 400 F.3d at 305; Decision and Order at 16.

Claimant has the burden of establishing entitlement to benefits and bears the risk of non-persuasion if the evidence is found insufficient to establish a required element of entitlement. *See Ondecko*, 512 U.S. at 281; *Young v. Barnes & Tucker Co.*, 11 BLR 1-147, 1-150 (1988); *Oggero v. Director, OWCP*, 7 BLR 1-860, 1-865 (1985). Because it is supported by substantial evidence, we affirm the ALJ's finding that the evidence as a whole did not establish total disability at 20 C.F.R. §718.204(b)(2) and thus Claimant did not invoke the Section 411(c)(4) presumption. *See Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 198; Decision and Order at 16. Further, because Claimant did not establish total disability, a requisite element of entitlement, benefits are precluded. *See* 20 C.F.R. §718.204(b)(2); *Anderson*, 12 BLR at 1-112.

Accordingly, we affirm the ALJ's Decision and Order Denying Benefits.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge